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PSYCHIATRY AND THE LAW OF CRIMINAL INSANITY*

Henry Weihofen†

MENTAL DISORDER AS A DEFENSE

THE logic of the law's recognition of mental incapacity as a defense to crime is simple enough: usually, crime involves the concurrence of a wrongful act and a wrongful intent; if the defendant because of his mental condition was incapable of entertaining the intent, he cannot be held guilty of the crime. The man who kills another by unavoidable accident is not a murderer. The man who walks off with a suitcase believing it his own is not a thief. So, too, the man who kills or takes possession of property while in a state of disordered consciousness is not held guilty.

The essential intent varies from crime to crime. If the charge is murder, the state of mind which the prosecution must establish is "malice aforethought"—a highly technical term which it is sufficient for our purposes to define as an intent to do something seriously endangering life or limb. If the charge is assault and battery, a high degree of carelessness is enough. Some crimes require a "specific intent," *i.e.*, an intent to do a certain thing, as distinguished from a more generally wicked or careless state of mind. Thus, one can be held guilty of arson only if he intended to burn a building; carelessness, no matter how gross, is not enough. Nor can one commit larceny carelessly; specific intent to deprive the rightful holder of possession is required. Psychiatrists may object that this legal concept of "intent" is a naive oversimplification of the process by which a person "makes up his mind" to commit a crime. They may object still more to the further legal rule

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that although intent is essential, motive is irrelevant (except insofar as self-defense, prevention of felony, *etc.*, can be said to be based on motive). Once it is determined that a man intended to do the act, the inquiry is at an end; the law is not interested in why he meant to do it. To the psychologist, this is a curious notion, for he cannot conceive of trying to understand human behavior without asking *why* the individual acted as he did. Why did this man kill his wife? Why did this other commit a series of rapes? Why do others under similar circumstances refrain from doing likewise? Only when we can answer the question "Why?" can we hope to understand why society needs protection against some individuals and not others. Studies made in recent decades, such as Sheldon and Eleanor Glueck's "Five Hundred Criminal Careers", and their more recent "Unraveling Juvenile Delinquency", have convincingly shown that criminal conduct is ordinarily a product of a complex of pressures and resistances rather than of a single mental operation of forming an "intent". Only through studies of these conscious and unconscious motives can understanding be had of the personality of the individual and what it is that makes him a menace to society. It is time for a re-examination of the criminal law dogma that motive is irrelevant. But in the meantime intent remains the legal formulation, and we must deal with it if we are to understand the criminal law.

It might seem from what has been said that the only question on the element of intent should be the factual one: did the defendant at the time of the act have the intent essential to constitute the crime charged? Insanity cases would differ from cases of unavoidable accident, mistake, or somnambulism only in that the former would call for expert psychiatric opinion, but the issue would still be whether at the time of the act charged the defendant had the intent to kill, or to steal, or to burn. But the courts have preferred to lay down more specific "tests" of insanity. Perhaps this is due to the pervasive human tendency to reduce broad and basic principles to rules of thumb; perhaps it is due to the feeling that rules

of thumb are more comprehensible to juries. In most jurisdictions the test adopted is that to avoid responsibility for crime, the defendant must be so insane as not to know the wrongfulness of his act.

The leading authority on the subject is *M'Naghten's Case*,¹ decided in England in 1843. M'Naghten had shot and killed the secretary to Sir Robert Peel under the influence of a form of mental disorder symptomized by delusions of persecution, in which Peel appeared as one of the persecutors. After the jury had returned a verdict of "not guilty by reason of insanity," popular interest in the case led the matter to be made the subject of debate in the House of Lords, where it was decided "to take the opinion of the judges on the law governing such cases." Five questions were put to the fifteen judges of England regarding the existing law of insanity. Both questions and answers were befogged by verbosity, but the rule which has survived is that to establish a defense on the ground of insanity, it must be proved that the accused "was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong." This "right and wrong" test, as it has come to be known, remains to this day the sole test of criminal insanity in England and in most American states.

The test actually comprises two tests: (a) knowledge of the nature and quality of the act; and (b) knowledge of its wrongfulness. But most courts seem to assume that this wording is merely another instance of lawyers' redundancy, and that the two clauses say essentially the same thing. Therefore, they very often omit the first part, and word the test merely in terms of knowledge of right and wrong. Perhaps the judges feel that the latter is more graphic for purposes of instructing a jury. But this narrows the test. Knowledge of the nature and quality of the act is a broader and more inclusive concept than knowledge of wrongfulness, at least if un-

¹ 10 Cl. & F. 200 (1843).

derstood in the light of present day psychological teachings. Gestalt psychology emphasizes the importance of looking at behavior as a whole. We might well take a page from the book of the primary school educators who in recent years have been studying the psychology of reading. We read, it now appears, not letter by letter, but by whole words, whole phrases and even whole lines at a time. Much of our behavior proceeds by such wholes, such configurations of details.

A defendant may remember many details of his act. The prosecutor may emphasize this fact, may bring out all the little details that the defendant can recall, and may argue from this that the accused has been shown to know what he was doing. But memory of details is not knowledge of the nature and quality of the act. That calls for something deeper and more vital. And it is the deeper understanding that the legal test requires—or at least what it should be deemed to require. The Iowa court's wording of the test,² which emphasizes knowledge of the "nature and consequences" of the act, therefore is preferable to the more common wording which emphasizes knowledge of right and wrong.

The word "wrong" as used in the test contains a patent ambiguity. Does it mean legal wrong, or moral wrong? If a disordered person commits a criminal act, knowing it is forbidden by the law, but believing himself to have been commanded by God to commit it, can it be said that he knew it was "wrong"? Or to put a stronger case, and one which is not merely hypothetical: the defendant not only knew that the act was a crime, and would subject him to punishment, but the very reason why he committed it was *because* he knew that was so; he was under a delusion that he was divinely commanded to save the human race by sacrificing his own life. He therefore killed in order that he might be legally executed and thus fulfill his divine mission. He comes within the test if "wrong"

² Although the instructions actually given by the Iowa trial courts vary somewhat, the wording approved by the state supreme court makes the test "power rationally to comprehend the nature and consequences of the act." *State v. Beckwith*, 46 N.W. 2d 20 (Iowa, 1951); *State v. Buck*, 205 Iowa 1028, 219 N.W. 17 (1928). Other Iowa cases are extensively reviewed in a Note, 32 Iowa L. Rev. 714 (1947).

means morally wrong. But if it means "illegal", he is guilty.

Amazingly, the judges in *M'Naghten's* case, in their prolixity, answered this question both ways. At one point they said that a person is punishable "if he knew at the time of committing such crime that he was acting contrary to law; by which we understand your lordships to mean the law of the land." Yet in their next answer they said, "If the question were put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction: whereas the law is administered on the principle that everyone must be taken conclusively to know it without proof that he does know it." It is amazing also that in the hundred years and more that have since elapsed, most courts have continued to use the word "wrong" without troubling to define it. One of the few cases to discuss the point directly is a New York case decided in 1915.³ One Schmidt, a priest, was charged with the murder of a woman with whom he had been having an affair. His defense was that he had heard the voice of God calling upon him by night and by day to slay her, and that he had yielded to the call in the belief that it was his moral duty. Judge Cardozo's opinion for the court contained a scholarly review of the history of the test and concluded that "wrong" means moral wrong. The Tennessee and Texas courts have held to the contrary; knowledge of the unlawfulness of the act is enough to render the accused responsible, even though he acted under a delusion that the deed was commanded by God.⁴ This holds persons suffering from some of the most extreme forms of mental disorder to be legally sane and responsible.

The legal and scientific soundness of the *M'Naghten* case rule

³ *People v. Schmidt*, 216 N. Y. 324, 110 N. E. 945 (1915).

⁴ *McElroy v. State*, 146 Tenn. 442, 242 S. W. 883 (1922); *Watson v. State*, 133 Tenn. 198, 180 S. W. 168 (1915); *Harrison v. State*, 44 Tex. Crim. Rep. 164, 69 S. W. 500 (1902).

has been the subject of endless debate.⁵ Almost every phrase has been subjected to both legal and psychiatric criticism. Psychiatrically, the more important criticisms that have been advanced are: (1) the questions and answers were intended to cover only cases of psychosis characterized by delusion; the judges knew that the questions referred to the case of *M'Naghten*, a paranoid individual with a fairly circumscribed delusional system; (2) the answers were premised upon psycho-pathological notions which only remotely conform to present-day psychiatric conceptions; (3) concepts of "right" and "wrong" belong to ethics; mental disorder cannot easily be interpreted in terms of its influence on ethical knowledge.

One of the most vocal of the present-day psychiatric critics, Gregory Zilboorg, recently said in an address,

To force a psychiatrist to talk in terms of the ability to distinguish between right and wrong and of legal responsibility is—let us admit it openly and frankly—to force him to violate the Hippocratic Oath, even to violate the oath he takes as a witness to tell the truth and nothing but the truth, to force him to perjure himself for the sake of justice. For what else is it, if not perjury, if a clinician speaks of right and wrong, and criminal responsibility, and the understanding of the nature and the quality of the criminal act committed, when he, the psychiatrist, really knows absolutely nothing about such things, when they are presented to him in terms of a hypothetical question, based on legal assumptions and hypothetical psychiatry. . . . It is quite obvious that the immoral, paradoxical situation has become more and more acute in the course of the past twenty-five years, during which we have learned more about psychopathology than during the previous century and a half.

⁵ A few of the numberless books and articles discussing the *M'Naghten* case rules are: GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925); WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* (1933); WHITE, *INSANITY AND THE CRIMINAL LAW* (1923); ZILBOORG, *MIND, MEDICINE AND MAN* (1943); Barnes, *A Century of the M'Naghten Rules*, 8 Camb. L. J. 300 (1944); Crotty, *The History of Insanity as a Defence to Crime in English Criminal Law*, 12 Calif. L. Rev. 105 (1924); Keedy, *Insanity and Criminal Responsibility*, 30 Harv. L. Rev. 535, 724 (1917); MacNiven, *Psychoses and Criminal Responsibility*, in *MENTAL ABNORMALITY AND CRIME* (Radzinowicz and Turner eds. 1944); Menninger, *Medico-Legal Proposals of the American Psychiatric Association*, 19 J. Crim. L. & Criminology 367 (1928); Tulin, *The Problem of Mental Disorder in Crime: A Survey*, 32 Col. L. Rev. 933 (1932).

Another able critic, Dr. Philip Roche, recently wrote along somewhat similar lines,

The tests of responsibility as expressed in the M'Naghten Rules are untenable propositions, not only within the discipline of scientific medical psychology, but also in operation in that they constitute an improper shifting of an onus of decision to the person of the expert witness. In the light that the M'Naghten Rules are propositions that have no consensus with established psychiatric criteria of symptomatic description the test questions are unanswerable. With the possible exceptional instance of a case of disturbed consciousness or of idiocy, no entities of medical disorder can be correlated with matters solely confined to the faculty of knowledge as explicit in the Rules. The test questions do not articulate with the facts of experience of the psychiatrist as a scientist, but they are meaningful to him as a member of the community as they are indeed to his fellow citizens who participate with him in the trial of an offender. In this legal convention the psychiatrist finds himself in a dual role; one as a scientist who brings technical information to the trial process, to the outcome of which he should be indifferent, the other as a fellow member of a social order who shares a value judgment in his answer to the questions of right and wrong.

That these men voice the views of American psychiatrists generally is clear from the responses of over three hundred in a recent poll. Their opinions in regard to the M'Naghten Rules were:

Satisfactory	12%
Unsatisfactory	80%
Fairly satisfactory	5%
Unsatisfactory but best yet proposed.....	21½%

These psychiatrist critics are supported in their views by some legal writers and judges. Chief Judge Biggs of the Third Circuit Court of Appeals, speaking for himself and two other members of the court dissenting in a recent case, said, "The law, when it requires the psychiatrist to state whether in his opinion the accused is capable of knowing right from wrong, compels the psychiatrist to test guilt or innocence by a concept which has almost no recognizable reality."⁶

⁶ Smith v. Baldi, F. 2d (1951).

Collaboration between law and psychiatry in criticizing the right and wrong test dates back at least to 1886, when Judge Henderson Somerville of the Supreme Court of Alabama was assigned the case of *Parsons v. State*⁷ for opinion and decision. Working in close collaboration with his chess-playing friend, Dr. Peter Bryce, as eminent a physician as Somerville was a judge, he wrote what has become the leading case adopting the so-called irresistible impulse test.

The failure to recognize "irresistible impulse" as a defense has been one of the serious points of attack on the right and wrong test. Since our criminal law is based on an assumption of free will, we should not punish men for what they cannot avoid. As an abstract proposition, this is unquestioned. "All the several pleas and excuses," said Blackstone, "which protect the committer of a criminal act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, *the want or defect of will*."⁸ Yet the English and most American courts refuse to apply this general proposition to the case where lack of free will is the result of mental disease. The reasons which these courts have given for this refusal—when they have given reasons—are four: (1) a disbelief that any truly irresistible impulse exists; (2) a feeling that even if it does exist, it is too difficult to prove or disprove to allow as a defense; (3) the defense is one dangerous to society; and (4) statutes setting forth the right and wrong test prevent courts from adopting any other.⁹

Whether a truly irresistible impulse can exist is a question for psychiatrists rather than for judges to decide, and dogmatic judicial denials that such a condition is possible have rather gone out of fashion. The problem of proof is a real one, but it is not peculiar to cases where alleged irresistible impulse is involved; it may

⁷ 81 Ala. 577, 2 So. 834.

⁸ 4 BL. COMM. *20.

⁹ The arguments against the irresistible impulse test are well stated in HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (1947) c. 14; and in Waite, *Irresistible Impulse and Criminal Liability*, 23 Mich. L. Rev. 443 (1925). See also WERTHAM, *THE SHOW OF VIOLENCE* (1949).

also be difficult to prove capacity or incapacity to know right from wrong. The solution lies in improving procedures so as to provide the courts with more scientific assistance, rather than in rejecting certain defenses merely because they are difficult to disprove. The courts which have said that irresistible impulse is a dangerous doctrine and which have warned of calamitous consequences if it were recognized, have never deigned to support their forebodings with any evidence to show that such consequences will result, or that they have resulted in the seventeen states¹⁰ where the defense is recognized. No statistics have ever been published proving that recognition of irresistible impulse tends to break down the administration of justice.

A more recent and more sophisticated objection has been ably presented by Professor Jerome Hall: irresistible impulse does not and cannot exist concomitantly with unimpaired knowledge of right and wrong. It is alleged that recent investigations show that even in kleptomania, the intelligence does not remain unimpaired. Also, the theory of the "integration of the self" postulates that the various functions of the personality are not separate, but interpenetrate one another and act as a unit. Serious mental disease impairs all aspects of the psychological organism, and therefore there can be no case of irresistible impulse where the rational functions, including knowledge of right and wrong, are unaffected. But while it is true that the affective, cognitive and the conative processes of the mind are interrelated, certain forms of mental disease may affect one more than the others. A disorder manifesting itself in impulsive acts may affect intelligence *somewhat*, but it is quite possible that impulsiveness may have reached the point where it can be said that it is "irresistible," and yet intelligence has

¹⁰ The irresistible impulse test has been accepted in Alabama, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Montana, New Mexico, Ohio, Vermont, Virginia, and Wyoming, although the decisions in a few of these states are somewhat ambiguous. For citations to cases see WEIHOFFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* (1933) 109 *et seq.*

not deteriorated so much as to obliterate knowledge of right and wrong.

The term "irresistible impulse" is not a very good one. "Irresistible" implies that the person was absolutely unable to resist; "impulse" suggests an urge that is sudden and overwhelming but momentary. Such conditions exist—for example, in the irrational acts of confused epileptics, paralytics and schizophrenics—but they are rare.¹¹ More common are urges which are not wholly irresistible, and which are not of sudden overwhelming force. Most exhibitionists, for example, have enough control not to yield to their impulse in the presence of a policeman. And if they were sure that they would be punished by torture or death, they would almost certainly restrain themselves. Nevertheless, they are the victims of urges so strong that most normal persons could not resist them under most circumstances. Or, to put it another way, their power to resist is less than that of most persons. Both the strength of the impulse and the individual's power to resist must be taken into account; in a sense, these are merely two aspects of the same phenomenon. Perhaps some other term such as "inability to adhere to the right" would be preferable to "irresistible impulse" to express this idea. But, however expressed, there is no doubt that

¹¹ Among psychiatrists, Dr. Frederic Wertham of New York has been most blunt in denying that serious crimes can be committed under irresistible impulse. In his book, *THE SHOW OF VIOLENCE* (1949) 13, 14, he says:

There is with one exception no symptom in the whole field of psychopathology that would correspond to a really ungovernable or uncontrollable impulse. That exception is an obsessive-compulsive neurosis. . . . Yet compulsions play no role in criminal acts. . . . It can be stated definitely and flatly that compulsions are always unimportant and harmless acts. A patient may have to count the windows of a room of a building, he may have to wipe off the doorknobs with his handkerchief (for fear of germs), he may have to avoid stepping on the cracks of a pavement, he may have to leave the elevator on the twelfth floor and walk up to the thirteenth; but he never has to commit a truly compulsive criminal act. . . .

In the whole literature of psychiatry and psychoanalysis there is not a single case where a violent act, homicidal or suicidal, constituted a symptom in an obsessive-compulsive neurosis. It is therefore always bad psychopathology to speak of a compulsive murder or a compulsive suicide.

The medico-legal theory of the irresistible impulse is advocated only by laymen and by psychiatrists who are scientifically not sufficiently oriented. It lends an air of scientific literalness and accuracy to a purely legal definition without any foundation in the facts of life or science.

some individuals are subject to abnormal urges which they have little power to control.

But, it may be argued, this reduces "irresistible impulse" to something which is not psychopathic at all. All men are subject to strong urges of various kinds, and most of us are weak enough to give way to them at times. How is the law to distinguish between the exhibitionist or the kleptomaniac and the man who steals a loaf of bread for his starving children or the bank clerk who steals several thousand dollars because he thinks he has a system which will not be found out? We must distinguish between impulses which are the result of extrinsic and those of intrinsic motivations. The starving condition of one's family is an extrinsic provocation; a psychopathic urge to steal unneeded articles is intrinsic. The line is admittedly not always easy to trace; frequently motivations will be mixed. But conceptually the distinction is clear enough.

Whether the law ought to recognize the irresistible impulse defense does not depend merely upon scientific questions such as whether such a condition can truly exist and whether it is susceptible to proof. The fact that alcoholic intoxication can exist and can be proved does not automatically answer the question what legal effect it should be allowed. A discussion of the desirability of allowing irresistible impulse as a defense quickly leads us back to a consideration of the fundamental purposes and premises of the criminal law.

Why do we punish criminals? Strange as it may seem, there is no agreement among those who should know best what we are trying to accomplish by our penal law. Historically, the purpose was rather clearly retribution. That "he who sins must suffer" seemed a matter of elementary justice, or a categorical imperative of the moral law. But justice does not call for retribution from one who had no wrongful intent, or who did not act from choice. On this premise, irresistible impulse should be accepted as a defense, for there is no justice in punishing a person for what he could not help.

But retribution is not generally accepted today as the primary purpose of punishment. Rather, we say the purpose is deterrence. By the threat of punishment, or by its actual infliction, or by the example of its infliction on others, we hope to deter individuals from committing anti-social acts. An individual who labors under irresistible impulse cannot be deterred, and so there is no purpose in holding him criminally responsible.

It may be argued, however, that deterrence is not merely a matter of deterring the given individual. Punishing even those who cannot refrain from acting might still serve as a threat and an example to others, and impress them with the serious view that the law takes of such conduct. Secondly, and more important, knowledge that the act is punishable and the consequent fear of punishment may be one of the stimuli tending to restrain the impulse, and to that extent a factor making the impulse resistible. Even under the most extreme deterministic theories, observation or knowledge that others have suffered pain in consequence of certain conduct is an experience impression which goes to influence the mechanistic translation of the impulse into action. The threat of punishment may tip the scales enough to make resistible an impulse otherwise irresistible. But this is true only of those who are to some degree capable of understanding the nature of their act, of anticipating future consequences and of being guided thereby. There are persons whom the threat of punishment cannot deter; they do not "respond" to reward and punishment in the normal way. A person who is incapable of understanding that a certain act is punishable or of anticipating the punishment cannot be stimulated by fear of such punishment. Nor is the punishment of such a person very valuable as an example to others. The average man is not exposed to increased inner temptation at seeing a person go unpunished who could not understand or avoid his act. On the contrary, punishing such a person is likely to be repugnant to the average man's sense of fairness and justice.

Although we might expect the armed forces in courts martial to

employ a more summary procedure than do the civil courts, the fact is that both the Army and Navy today employ a level of scientific jurisprudence which the civilian courts have not yet attained. In the Navy the Judge Advocate General seeks medical counsel from the Bureau of Medicine and Surgery before handing down legal opinions in cases involving behavior problems. The Legal Medicine Branch acts only in an advisory capacity but has been given the widest latitude in appraising problems of culpability. The Army during World War II had a bulletin prepared dealing with psychiatric testimony before courts martial. The irresistible impulse was included in deciding whether the defendant was insane at the time of the act charged.

In England, although proposals to establish irresistible impulse as a defense have been rejected, in practice the courts in cases where the issue is raised instruct the jury that if a man's will power is destroyed by mental disease, it may be that the disease so affected his mental powers as to destroy his power to know what he was doing, or that it was wrong. Where this thought is sufficiently emphasized in the charge to the jury, it is probably sufficient to obtain a verdict of insanity in cases of ascertainable psychosis or epilepsy involving such automatism as to enable experts to testify that the person was unable to know the nature and quality of the act or, if he did know it, to know that it was wrong. Moreover, under the Criminal Lunatics Act of 1884 the Home Secretary is empowered to intervene after sentence and before execution, to appoint a committee of medical men to examine into the prisoner's present sanity and to substitute commitment in lieu of the criminal punishment. In this investigation the committee applies the same psychiatric standards as in other commitment proceedings. This affords a psychiatric check on the operation of the legal test of responsibility which makes the administration of the latter much less mechanical and inflexible than in most of the American states which assume that they are adhering to the English rule in holding strictly to the right and wrong test.

Actually, the controversy over irresistible impulse is of less practical than it is of doctrinal importance. The instances of crimes committed as a result of truly irresistible impulse are certainly very few. The defense is not usually urged in court in the kind of cases where clinically we should expect it most, namely, in larceny and arson cases, but is typically raised as a defense to murder, where it is highly improbable. The reason, of course, is that persons accused of crimes for which the maximum punishment is imprisonment for a relatively short term of years are not likely to defend by urging their own insanity, for which they may find themselves committed indefinitely; but to a defendant facing a possible capital sentence, irresistible impulse may serve as "something to seize when nothing more tangible is evident."

Psychiatry today has advanced beyond the point where addition of the irresistible impulse test could be deemed adequate to remedy the deficiencies of the right and wrong test. Both tests fail to give due emphasis to the fundamental concept that the mental processes are interdependent and interrelated. Projective psychological tests have demonstrated how mental disorder affects every facet of the intelligence. Both of the established tests fail particularly to provide adequate bases for judging severe psychoneurotics and others whose criminal acts often seem to stem from unconscious motivations. All of us, the normal as well as those not so normal, are more influenced by our emotions than by reasoning. Although the actor may be conscious of only one motive, his mental attitude and his physical behavior in response to a given stimulus or situation is almost certainly the end product of a complex of psychological processes. The criminal, even more than the rest of us, may be largely unaware of the reasons for his behavior.¹² Of this, the legal tests take no cognizance whatever.

It is time that the law caught up with present-day psychiatric understanding of the overspreading influence of mental disorder. The courts could take one step in this direction with relatively little

¹² Abrahamsen, *Motivation of Crime*, 26 B. U. L. Rev. 91 (1946).

disturbance of precedent, by reformulating their rules governing burden of proof. While definite proof should be required of the existence of mental disorder, when it is once shown that the defendant has such a disorder, the burden should be on the prosecution to prove that he was nevertheless capable of knowing the nature and quality of his act and that it was wrong, and (where irresistible impulse is a defense) that he acted with volition. The courts have not made this distinction between proof of mental disorder and proof of criminal irresponsibility but have too frequently used the ambiguous word "insanity" to refer to both. This very ambiguity, however, would make it relatively easy to reconcile the ambiguous precedents with the suggested rule. In half the states the rule now is that while all persons are in the first instance presumed to be sane, if evidence is introduced to raise a reasonable doubt in the matter, the ultimate burden is on the prosecution to convince the jury that the accused is sane within the legal test of responsibility. In these jurisdictions conversion to the rule suggested would require only that the courts recognize that establishing the existence of mental disorder creates a reasonable doubt of responsibility. In the other half of the states the defendant has the burden not only of creating a reasonable doubt, but of ultimately convincing the jury that he was irresponsible within the meaning of the legal test. But most of these states have held, and probably none would deny, that evidence of permanent, chronic or continuous mental disorder at some time prior to the crime will be presumed to have continued and to have existed at the time of the crime, unless the contrary is proved. It is true that most of the cases so holding say that the effect of this presumption is merely to shift the burden of going forward with the evidence. In Texas, however, it has been held that the presumption of continuance not only shifts the burden of going forward with the evidence but the ultimate burden of convincing the jury. The Texas cases show how a court which nominally places the burden of proof on defendant can, by use of the presumption of continuance, make the practical

operation very similar to that under the opposite rule, placing the ultimate burden on the prosecution. Georgia, Missouri, and South Carolina cases also contain wording which could without much straining be reconciled with the rule proposed. In other states that put the burden of proof on the defendant, reconciliation could be effected by converting the presumption of continuance from one which only shifts the burden of going forward with evidence to one which shifts the ultimate burden of conviction.

Delusions have at times been made the subject of special legal rules. Although in one of their answers the judges in *M'Naghten's* case laid down the right and wrong test, in another they said that if a person under an insane delusion as to existing facts commits an offense in consequence thereof, and assuming "that he labours under such partial delusion only, and is not in other respects insane . . . he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real."

How this "mistake of fact" test was supposed to fit in with the "right and wrong" test was not made clear. The latter, said the judges, was to be given "in all cases." The former, it seems, was not intended as a substitute, but at most was a supplemental rule. The explanation for the special reference to delusion as a test or symptom is historical. In 1800 Lord Erskine, in his eloquent defense of Hadfield,¹³ had stated that "delusion . . . where there is no frenzy or raving madness, is the true character of insanity." Hadfield suffered from systematized delusions that like Jesus Christ he was ordained to give his life for the world's salvation. He therefore shot at King George III, that by the appearance of crime he might be executed and so make the sacrifice he felt divinely called to make. He was acquitted, more because of Erskine's brilliant discourse than because of the soundness of his law. Since the judges in *M'Naghten's* case were purporting merely to state the existing law, they apparently felt obliged to accept this

¹³ Hadfield's Case, 27 How. St. Tr. 1282.

precedent as law, but they narrowed the inquiry by making it purely objective; the delusion must not only be externally and apparently connected with the crime, but the connection must be such as to render the act justifiable if the facts of the delusion had been true.

This naively legalistic attempt to devise an external, objective standard by which to judge the conduct of mentally disordered persons has been the butt of devastating criticism by both medical and legal authorities. Medically, it is error to single out one symptom of a disease pattern, which in fact may be no more important than other symptoms. Legally, the main criticism made is that by this test a person acting under a delusion is judged by the same standard as a sane person. As Dr. Isaac Ray said, a lunatic will not be held responsible for his act, provided only that he acts with reason and propriety.¹⁴ This was what Judge Ladd of New Hampshire in 1871 called the "exquisite inhumanity" of the rule. "It practically holds a man confessed to be insane," he said, "accountable for the exercise of the same reason, judgment and controlling mental power, that is required of a man in perfect mental health. It is, in effect, saying to the jury, the prisoner was mad when he committed the act, but he did not use sufficient reason in his madness."¹⁵

There was no inhumanity in the rule as the judges in *M'Naghten's* case conceived it. The rule applied, they said, where the person is "labouring under such partial delusion only, and is not in other respects insane." A person "not in other respects insane" could quite rightly be expected to reason about the subject of his own delusion as well as a sane man. The difficulty is that no such person exists. The judges' assumption that a person might suffer from delusion and yet be otherwise unaffected mentally was based on medical misconceptions of the time, the now exploded theories of monomania and phrenology. Monomania was described

¹⁴ *State v. Jones*, 50 N. H. 369, 387, 388 (1871).

¹⁵ RAY, *MEDICAL JURISPRUDENCE* (5th ed. 1871) 49.

in the 1830's by the great French alienist, Esquirol. It was essentially a state of mind characterized by the predominance of one insane idea, while the rest of the mind was normal. James Cowles Prichard, the leading English alienist of the time, accepted the entity as one of the four types of insanity. Phrenology dates from 1810-1819, when Gall and Spurzheim's four famous volumes on the anatomy and physiology of the nervous system appeared, announcing their theory that the brain was a bundle of some twenty-seven different organs presiding over the different traits of the individual. The dominance of each trait was supposed to depend upon the size of that part of the brain, and this could be ascertained by studying the shape of the skull. This half-scientific, half-fanciful conception was in 1843 being hailed as the long-sought key to the mystery of the mind. With its concomitant, faculty psychology, it continued in favor almost to the end of the century. It was only natural that the fundamental tenets of these theories should influence the judges in formulating a rule which presupposed a person suffering from "partial delusion" and "not in other respects insane." Today, phrenology has followers only among the more gullible patrons of gypsy fortune tellers, and the rule it engendered has been widely repudiated, but it still remains the law in Florida, Utah and perhaps several other states.

The New Hampshire court has rejected all the legal tests that have been devised, and has held that the question of responsibility for crime is one of fact for the jury. The only rule the court should give the jury is that if the defendant had a mental disease, and the act charged was the product of that disease, they should acquit. Under the New Hampshire rule the ultimate question to be determined is "whether, at the time of the act, he had the mental capacity to entertain a criminal intent—whether, in point of fact, he did entertain such intent."¹⁶ It is, of course, frequently very difficult to prove whether an act was or was not the product of mental disease. A prominent psychiatric author said in 1918, "It is a long

¹⁶ *Id.* at 382.

road from the demonstration of the possibility to that of the probability or the certainty of a causal connection between the disorder as it exists and the deed of which the person stands accused."¹⁷ For this reason other courts, when they have taken notice of the New Hampshire rule at all, have rejected it as impractical. "Only Omniscience can say," said the California court, "whether the act would have been committed had the taint not existed."¹⁸ But less-than-omniscient judges and juries find it difficult also to say whether an accused knew right from wrong, or acted under an irresistible impulse.

No one has ever demonstrated that the New Hampshire courts have more difficulty than others, or that New Hampshire juries return more dubious verdicts. It is true that the New Hampshire rule turns the problem over to the jury with a minimum of legal rules to guide them, but the lawyers' faith in elaborate instructions as guides which the jury is supposed to take to heart and apply in arriving at a verdict is probably excessive. Most of the verbal niceties of instructions which lawyers quibble over, and over which appellate courts sometimes reverse cases, probably never affect the jury's actual deliberations at all. We hesitate to admit, even to ourselves, the many extraneous devices that influence jurors. The way a lawyer dresses, the locale from which he comes, his ability to address each juror by name weigh more heavily with many jurors than intricate points of law.

Many of the most competent and thoughtful psychiatrists agree with the New Hampshire court that it is impossible to write a scientifically and legally valid definition of insanity. Professor John Whitehorn of the Johns Hopkins Medical School recently prepared an informal memorandum on this subject for a Commission on Legal Psychiatry appointed by the Governor of Maryland. In it Professor Whitehorn said,

¹⁷ JACOBY, *THE UNSOUND MIND AND THE LAW* (1918) 82.

¹⁸ *People v. Hubert*, 119 Cal. 216, 51 Pac. 329 (1897).

Psychiatrists are challenged to set forth a crystal-clear statement of what constitutes insanity. It is impossible to express this adequately in words, alone, since such diagnostic judgments involve clinical skill and experience which cannot wholly be verbalized. . . . The medical profession would be baffled if asked to write into the legal code universally valid criteria for the diagnosis of the many types of psychotic illness which may seriously disturb a person's responsibility, and even if this were attempted, the diagnostic criteria would have to be rewritten from time to time, with the progress of psychiatric knowledge.

The New Hampshire court is also on solid ground in holding that once the presumption of sanity is overcome with evidence of mental disorder, the prosecution has the burden of proving sanity beyond reasonable doubt. Present day psychiatric recognition of the all-pervasive influence of mental disorder justifies a strong presumption that criminal conduct on the part of a mentally disordered person is the outgrowth of his disorder, and justifies placing on the prosecution the heavy burden of establishing that in the case at bar, it was *not* the product of the disorder.

A supposed form of disorder frequently encountered in the courtroom, though not elsewhere, is "temporary insanity." There are of course disorders characterized by brief periods of derangement or lapse of consciousness. In epilepsy, for example, seizures are often followed or displaced by an automatic state. But such manifestations, while transitory, are recurrent; epilepsy is anything but a temporary affliction. The temporary insanity dear to the hearts of defense lawyers, however, is wholly a thing of the moment; a man without any history of mental abnormality prior to the act, and exhibiting no symptoms upon examination afterward, is alleged to have been "temporarily insane" and without understanding of the nature of his act or its wrongfulness at the moment of killing (this peculiar malady seems to occur only in homicide cases). To medical men this is about as likely as a momentary uremia in a man with perfectly normal kidney function.

It is possible for strong emotional agitation momentarily to

overwhelm consciousness even in a sane person. As the hackneyed phrase goes, "Then everything went black." Courts have rightly taken a dim view of this defense, but if it could be proved actually to have been the case—a difficult if not impossible task—the defendant should logically not be held responsible, any more than a somnambulist is held for acts done while sleepwalking. Whether the courts would accept this view, however, it is impossible to say, for the issue has seldom been squarely presented. Typically, the defense made is not that the defendant was a sane man temporarily deprived of consciousness by overwhelming emotional stress, but that he was "insane", albeit only temporarily, and therefore must be judged by the conventional insanity tests.

And even though the expert testimony may be adverse to the contention, a jury whose sympathy is with the defendant may seize upon it to acquit him when no other door is open. This happens on occasion where a killing was prompted by the adultery or other sexual misconduct of the spouse. Except in Texas and a few other American states,¹⁹ the Anglo-American system of law does not recognize such misconduct as justification for killing either the guilty spouse or the third party. The "heat of passion" aroused by finding one's spouse committing adultery is given weight only to the extent of reducing the homicide from murder to voluntary manslaughter. Nevertheless, the inclination of juries to regard such provocation as a complete justification for killing is so well known that newspaper writers have elevated it to the dignity of what they call "unwritten law". The problem of the defense becomes one of getting the facts of the misconduct to the jury. The "heat of passion" argument applies only where the killing occurred promptly upon seeing or otherwise being informed of the adultery, and is not available if there was time for the average man to cool off and regain control of himself. Moreover, it is only an argument in mitigation, and not a full defense. Also, in most states it applies

¹⁹ *Gibson v. State*, 44 Ga. App. 264, 161 S. E. 158 (1931); *Sensobaugh v. State*, 92 Tex. Crim. Rep. 47, 244 S. W. 379 (1922); N. M. STAT. 1941 ANN. § 41-2414; UTAH REV. STAT. ANN. (1933) § 103-28-10. See Note, 2 Tex. L. Rev. 111 (1924).

only in adultery cases; catching a sister or other female relative in sexual misconduct with some man is not enough to reduce a killing to manslaughter.²⁰ It is not strange, therefore, that it is sometimes contended that learning of the offense created a "temporary insanity" in the defendant. In the sensational *Remus* case in Ohio a few decades ago, the defendant killed his wife while divorce proceedings were pending. There had been no immediate provocation, but by setting up the defense of insanity, the accused was able to introduce evidence of the wife's infidelity and of a conspiracy to deprive him of property, and to contend that this drove him insane. The prosecution's experts unanimously declared him sane, but the jury found him not guilty because of insanity.²¹

Cases such as this must be accepted as a normal concomitant of the jury system. Indeed, they can be said to be the justification of the jury system. No one would claim that a jury is more competent than the judge to pass upon the literal correctness or truth of the testimony presented; the only justification for getting a jury's reaction is that we want a community consensus. Taking the verdict of the jury allows the rule of law to be tempered by the public sense of justice in hard cases. This has in fact nothing to do with the defense of insanity as such. It is merely the case of a jury unwilling to apply the law as written, and using any excuse that happens to be at hand. Self-defense is sometimes similarly used; on unconvincing testimony, the jury find that the adulterer was shot in self-defense.²²

²⁰ The Utah statute, however, includes not only the wife but also the "sister, mother or other female relative or dependent;" moreover, it applies not only to commission, but also to attempts to "rape or to defile." Defilement is not limited to sexual intercourse; cunnilingus has been held to be included in its meaning. *State v. Besares*, 75 Utah 141, 283 Pac. 738 (1929).

²¹ *In re Remus*, 119 Ohio St. 166, 162 N. E. 740 (1928). For another illustration see Arado, *Vignettes of the Criminal Courts*, 31 J. Crim. L. & Criminology 175, 182 (1940). See Notes, 43 Yale L. J. 809 (1934); 19 Neb. L. Bull. 146 (1940). See also BREARLEY, HOMICIDE IN THE UNITED STATES (1932) 51, 52, discussing the social pressure behind such killings in defense of one's "honor."

²² For a case involving the defenses of both alleged insanity and self-defense, see *People v. Garippo*, 321 Ill. 157, 151 N. E. 584 (1926). In this case a father killed a man against whom his seven-year old daughter had made a complaint, which in fact was untrue. The jury found him guilty of manslaughter.

THE NEW DIRECTION

Fundamentally, why should it make any difference whether a person who has committed a criminal act was sane at the time and therefore guilty, or "not guilty by reason of insanity?" In either case he has shown himself a menace to society, who must be taken into custody and control. Why worry over whether that control is based on criminality or insanity?

The traditional answer is that the sane offender is responsible for his acts and the insane is not, and that this distinction is morally and legally important. The sane offender is stigmatized with guilt because he is a responsible moral agent who, knowing right from wrong, voluntarily chose to do wrong. The insane man exercised no such free choice. By definition, he did not know right from wrong; he did not act with criminal intent. It would be unjust to brand a person a criminal for committing an act which he had not the mind to understand or avoid. And while it may be true that the irresponsible offender must also be taken into custody, this is merely for the protection of society and of himself, and not as punishment for crime.

"Responsibility," "guilt," "punishment," "crime"—these are the value-charged words around which the argument revolves. Guilt carries connotations of moral blameworthiness, of sin. Sin connotes wickedness of mind. The person who because of mental defect or disease could not entertain a wicked intent is not "guilty." He is not responsible. Punishment is for the guilty, not for the irresponsible.

All this fits in nicely with the average man's notions of natural justice and morality, particularly with his tendency to identify criminal punishment with his own primitive urge to take an eye for an eye. Only slowly are men of more scientific bent of mind extricating the criminal law from the grip of this quasi-religious conception, and replacing it with a more positivist approach. Instead of concentrating upon whether the accused had sufficient knowledge or will power to be held responsible for his act, the

new approach would start with the proposition that the individual's social dangerousness and not his moral blameworthiness is the essential criterion in administering the criminal law. Absence of fault may indicate absence of dangerousness, as where an act occurs by unavoidable accident, but while we should not lock a man up because the head of his axe unexpectedly flew off and killed another while he was chopping wood, there is the best of reason for locking up the man who killed another by reason of a mental disorder from which he is still suffering and which may lead him to kill again.

There is no more need for the law to exact retribution from the criminal, according to this view, than there is for doctors to become angry with a diseased individual. Individualized treatment measures should be adopted in each case to protect society against further dangerous acts by the accused, by rehabilitating him if that is possible, and by restraining him in the meanwhile. If he can quickly be "reformed" and released with safety, we should not subject him to useless and superfluous punishment, and the public to needless expense, merely on a metaphysical supposition that punishment proportionate to the wrong done is a necessary complement of crime. On the other hand, if analysis of the convict's personality indicates that he cannot safely be released, he may have to spend the rest of his life under legal supervision of some kind, even though the only crime he has actually committed was a minor one.

More specifically, this program calls for sharp separation of the two major questions involved in a criminal trial—ascertaining whether the accused did in fact commit the act, and, if he did, deciding what should be done with him. The judicial trial would be limited to the first question. The legally trained judge is qualified to conduct the trial, rule on admissibility of evidence and charge the jury on the law applicable to the facts. But after the defendant has been found guilty—*i.e.*, after he has been found a proper subject for control and correctional treatment—the deci-

sion as to *what* kind of treatment is needed calls for a methodology and talents quite different from those developed by legal training and judicial experience. The training and clinical experience of the psychiatrist, including his understanding of the revelations of adjuvant psychological tests, gives him a special insight into the makeup of offenders and qualifies him not only to express an opinion on the presence of mental disorder, but also to detect motives, determine the level of intelligence, measure the force and discretion of anti-social drives, discover guilt-ridden individuals with an abnormal need for punishment, and evaluate the relative value of punishment, probation and psychotherapy in individual cases. Fixing the sentence should therefore either be taken from the judge entirely and vested in a tribunal composed of experts qualified to evaluate psychiatric, psychological and sociological data, or if the judge be allowed to continue to pass sentence, the sentence should be a wholly indeterminate one, under which the person could be held as long as necessary, whether that be for a few days or for the rest of his life. If the wholly indeterminate sentence seems to vest too much uncontrolled discretion, at least any maximum and minimum prescribed should be very wide, so as to allow the administrative agency broad discretion as to the length of time the person might be subject to control.

Psychologically, it would seem wise to retain the sentencing judge. The symbol of the wise and just father, punishing wrongdoers, probably adds to the stability of society and to the average individual's feeling of security.

Crime is a complex phenomenon, and the remedial program should be individualized as far as possible. Absence of this viewpoint is the reason why so-called reform schools typically fail to reform. Their accent is on regimentation rather than on individualization.

A central receiving station or clearing house should be set up, to which every convict would be sent for scientific investigation and determination of the kind of treatment to be applied and the

institution to which he should be sent. Any such decisions would be open to continual revision in the light of the individual's progress or retrogression. Existing probation and parole practices would have to be overhauled to fit into the new order.²³

If this approach were adopted, it would

(1) leave the proper treatment to be determined by experts on the basis of the individual's case history, prognostic tables, and his progress, instead of by a judge who lacks the training, the time, the facilities and the prophetic foresight needed to pronounce in advance the sentence that will prove best in each case;

(2) make for uniformity of treatment, to replace the notoriously gross differences in judicial viewpoints, which result in one defendant's receiving a 5-year sentence for an offense for which another defendant, tried by a different judge, may receive 6 months;

(3) practically eliminate the defense of insanity. This is most important for our present purpose. The jury, its function restricted to deciding whether the accused committed the act charged, would no longer have to consider the state of mind with which the act was done. All offenders would be accorded the kind of therapeutic or custodial care appropriate to their individual cases. Those suffering from mental illness would be sent to a mental institution—which is what usually happens under a successful insanity plea anyway. But such illness, instead of being taken into account in determining whether the defendant was "guilty" or not, would enter into consideration only in deciding what to do with him.

It is necessary to take care, however, not to allow enthusiasm for scientific procedures to lead us into administrative absolutism. There is danger in assuming that the action of an administrative

²³ SINGER AND KROHN, *INSANITY AND LAW* (1924) 414; WHITE, *INSANITY AND THE CRIMINAL LAW* (1923); Gausewitz, *Considerations Basic to a New Penal Code*, 11 Wis. L. Rev. 346 (1936); Glueck, *Principles of a Rational Penal Code*, 41 Harv. L. Rev. 453 (1928); Harno, *Rationale of a Criminal Code*, 85 U. Pa. L. Rev. 549 (1937); Menninger, *Medico-Legal Proposals of the American Psychiatric Association*, 19 J. Crim. L. & Criminology 367, 373 (1928); Wilbur, *Should Insanity Defense to Criminal Charge Be Abolished?* 8 A. B. A. J. 631 (1922).

board composed of psychiatric and sociological experts would always be wise and good. "Unfortunately, history records other eventualities—and in places where 'scientific criminology' reached its highest peak."²⁴

Safeguarding society should not assume so all-important a role that we ride rough-shod over the legitimate interests of the individual, his right to fair and decent treatment and to have his life and liberty held inviolate against unjustified infringement by the state. Where to draw the line between individual interests and those of the state is a fundamental issue of modern politics, far transcending criminal law. It echoes through all the debates about fascism and communism, the welfare state, rugged individualism, social security, socialized medicine, loyalty investigations, freedom of speech and press and other political questions of the day. At least since the time of Jeremy Bentham, the search for the happy mean has been incessant. There is as yet no agreement that we have found it. The point is that the problem is a moral one. Criminology cannot be purely "scientific;" it must face choices based on ethics, on an articulate philosophical position regarding the relationship of the individual to society. Developing procedures which are scientifically sound and yet conformable to our traditional concepts of "ordered liberty" is a task which challenges our ingenuity, but it is certainly not beyond us.

Like so many other reforms deemed highly revolutionary, this call for the scientific fitting of the treatment to the needs and potentialities of the offender has, as the Gluecks pointed out, long been recognized. "It is at least as old as Aristotle."²⁵ A Committee of the Institute of Criminal Law and Criminology urged it in 1919.²⁶ Governor Alfred E. Smith recommended it to the New York legislature in 1928. "After guilt has been determined by legal process," he said, "instead of sentence being fixed by judges

²⁴ HALL, *PRINCIPLES OF CRIMINAL LAW* (1947) 53.

²⁵ GLUECK AND GLUECK, *AFTER-CONDUCT OF DISCHARGED OFFENDERS* (1945) 99.

²⁶ Report of Committee "A" of the Institute, 10 *J. Crim. L. & Criminology* 184 (1919); GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1927) 455.

according to statute, I should like to see offenders who have been adjudged guilty detained by the state. They should then be carefully studied by a board of expert mental and physical specialists, who after careful study of all the elements entering each case would decide and fix the penalty for the crime. I realize the complexity of such a fundamental change. . . . It appeals to me as a modern, humane, scientific way to deal with the criminal offender."²⁷

Limited efforts to adopt this approach in insanity cases have been made in this country in the past, but they have all run afoul of constitutional objections. As early as 1909, the State of Washington enacted a law providing that insanity should no longer be a defense to crime, but that if the court deemed a defendant insane, it might order him confined in the state hospital. This was promptly declared unconstitutional by the state supreme court because it violated the defendant's right to trial by jury.²⁸ The right to jury trial, said the court, extended to all the elements of guilt; mental responsibility was an essential element of guilt, and therefore could not be taken from the jury. Mississippi in 1928 passed a law providing that insanity should not be a defense to murder; on conviction the defendant was to be sentenced to life imprisonment, but the governor was empowered to have him transferred to a mental hospital if his condition warranted. This was held to violate due process of law.²⁹

Both of these decisions were premised on the assumption that our traditional conceptions of responsibility and guilt are immutable and constitutionally inviolate. But this can hardly be maintained. It is true that the general principle that a person should not be punished criminally unless he did the act with some wrongful state of mind can be traced back at least to the development of

²⁷ Quoted by Judge Cardozo in his lecture on *What Medicine Can Do for Law*, in HALL, *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* (1947) 371, 375.

²⁸ *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020 (1910). The case was criticized in Rood, *Statutory Abolition of the Defense of Insanity in Criminal Cases*, 9 Mich. L. Rev. 126 (1910).

²⁹ *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931).

Christian ethics, but it did not attain its current formulation until much more recently. The concept that all men are free moral agents who are responsible for their acts (with certain exceptions such as infants and insane persons), was not a factor in early law, not even in the classical criminology of Beccaria. It became of primary importance only with the rise of the neo-classical school of the French Revolution. In recent times the legislatures have created a large number of statutory crimes by which various acts are made criminal whether or not committed with any wrongful intent. Statutory rape is a fairly well-known example. The court will listen with callous indifference to a defendant's protestations that he had no intention of violating the law; that he took particular care to ask the girl her age and she told him she was eighteen; and that to any reasonable and prudent man she would in fact appear to be at least eighteen. An even better known example to most readers are the speed laws. Few motorists have any illusions that it is a defense that they "didn't realize they were doing sixty," or that a defective speedometer registered only forty-five. Laws prohibiting the possession of counterfeit dies, or the sale of colored oleo, or of liquor to children are other examples. It is true that almost all such statutes can be construed as merely forcing a person who voluntarily embarks upon certain action, such as selling food, seducing women or driving cars, to take the risk of certain unintended consequences, and so can be distinguished from a proposal to hold persons amenable to the law for consequences happening without their intelligent intention or volition. But there is nothing in most state constitutions which expressly or by reasonable implication forbids the extension. It was only by resorting to vague concepts of "due process," "natural law" and "justice" that the courts were able to find a basis for striking down the Washington and Mississippi acts.³⁰

The Washington and Mississippi decisions do not necessarily foreclose the question of constitutionality of the program outlined

³⁰ See Weihofen, *The Metaphysical Jargon of the Criminal Law*, 22 A. B. A. J. 267 (1936).

above. First of all, the new approach to the crime problem has gained immensely in popularity since those cases were decided, so that it is not as likely today to shock the judicial concept of "justice." Moreover, it is perhaps paradoxical but true that because the present program is much more radical, it may appear less so. The Washington and Mississippi laws were limited to cases involving the defense of insanity. Except as applied to such cases, they did not challenge established criminal law philosophy and practice. Against the established concepts, they were anomalies, and the courts judged them in the light of those concepts. But the present program challenges those foundations themselves and so invites the courts to re-examine the premises which were taken for granted in those cases.

Moreover, the basic philosophy of the new approach has already been accepted in isolated types of situations, so that its general acceptance now would merely be an extension to all cases of what is already being done in some. Reformatories, probation, parole, and the establishment of psychiatric clinics attached to the courts were steps in that direction, although each in itself was such a short step that advocates of punishment as an essential corollary of crime could overlook its significance.

Most of the sexual psychopath laws embrace the positivist viewpoint openly and wholeheartedly. The determination of sexual psychopathy is placed largely in the hands of experts, using a scientific rather than a judicial procedure, and the person found to be a sexual psychopath is committed for as long as may be necessary for his cure and the protection of society—not for an arbitrary period fixed by statute or by the court as proper to "pay for his crime." The juvenile court acts have for years applied a decriminalized procedure in dealing with children. The Youth Correction Authority Act, promulgated by the American Law Institute and already adopted, with varying modifications, by several states and the Federal Government, applies this approach to a much larger group, youth above the juvenile court age but under

21, from which a very large percentage of the criminal population comes. The act provides, first, that when a youth is found guilty of an offense, there shall be a careful investigation of the cause of his offending; second, that anything within the bounds of what is humane shall be done to correct that cause and prevent his further criminality; third, that when he is released, he shall be actively helped to live an honest life; and fourth, that if he cannot be made safe to return to society, he shall be kept in custody *for life*. An "authority" would be set up under the terms of the act and charged with its administration. It is contemplated that this would be made up of persons chosen from the professions of education, social work, penology and psychology. Convicted offenders would be turned over to the authority, which alone would have the power to determine the treatment, except that in capital offenses the judge would retain power to impose death, life imprisonment or a fine. Protection against being kept under control for too long a time is afforded by provisions requiring the authority to make periodic re-examination of each case, and to release all persons when they reach the age of 21 (if committed before they were 18) or the age of 25 at the latest, unless the authority applies to a court for review of an order directing that the person remain subject to control beyond such time. This prevents arbitrary deprivation of liberty and assures opportunity for a fair hearing on the question of whether continued control is justified, and yet permits such continued control—for life, if need be—where protection of the public requires.

Professor John B. Waite of the University of Michigan Law School, the moving spirit in the Youth Correction program, frankly admits that there is no reason why the act should apply only to youth. It was so limited simply because it is easier to get people interested in a program to save young offenders than in saving criminals as a class.³¹ If the program proves a success for crimi-

³¹ Waite, *The Youth Authority Program*, in *Crimes of Violence*, The Report of a Conference on Crime sponsored by the University of Colorado, Aug. 15-18, 1949, p. 90.

nals up to 21 years of age, people will be sure to ask, why not try it for the others? California has already taken a step in this direction, and has set up an Adult Authority with power to determine, within limits, the length of time of imprisonment of felons not sentenced to death. In England, too, the setting up of a "Treatment Authority" has been recommended, to prescribe and supervise treatment, whether institutional or other, of certain classes of offenders, particularly young persons. Professor Hermann Mannheim of the University of London has said that "the setting up of an administrative authority of this kind, endowed with wide powers, will sooner or later become imperative in most countries, who wish to make the sentencing policy of criminal courts both more scientific and more uniform and to produce closer co-operation between courts and the penal system."³²

But a crime prevention program must begin with youth long before the age of sixteen. The psychiatrist working with the criminals would emphasize the truth of the poet's words, "The child is father of the man." In the vast majority of criminal careers there are evidences of social maladaptation stretching back into the years of childhood. All along the road to adulthood there are milestones clearly marking the way. And the pace seems to be by geometric rather than by arithmetic progression. It is the conviction of all psychiatrists that the earlier remedial work is begun with maladjusted individuals the greater the hope of success. If the question arises whether to use limited funds for building a model adult prison or for furnishing better probation and psychiatric services for a juvenile court, we should certainly choose the latter. Any device that will prevent juvenile delinquency will by the same measure reduce the incidence of adult crime. School teachers should have a thorough orientation in how to spot seriously maladjusted children, and there should be child guidance clinics to which they can be referred. The school systems should have

³² MANNHEIM, CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION (1946) 235-36.

remedial reading and speech classes, vocational classes and shop centers to aid in the adjustment process.

Professor Sheldon Glueck and his wife Eleanor have clearly sounded this note in their outstanding study, "Unraveling Juvenile Delinquency." They suggest:

Fundamental changes in school curricula and teacher training are also necessary. We must properly recognize the temperamental and emotional differences and special abilities and disabilities of children and the role of teachers as parent-substitutes and "ego-ideals" in the structuring of character. Forcing certain types of children into the traditional mould results in increased tension and revolt. The problem calls for greater flexibility in supplying a rich variety of satisfying school regimes to suit various psychologic and morphologic types.

Character prophylaxis—the testing of children early and periodically to detect malformations of emotional development at a stage when the twig can still be bent—is as necessary as are periodic medical examinations. In other words, a preventive medicine of character and personality is a crying need of the times.

Dr. Walter Bromberg has called attention to one group whose treatment at the hands of teachers is all too frequently unenlightened and harmful. These are the pupils who are deficient in verbal factors, who suffer from reading or writing disabilities which interfere with their literate education. Our educational methods "revolve around verballity, *i.e.*, ideas clothed in words."³³ Many who are manually quick and skillful are confused when confronted with abstract ideas. The school's emphasis on verbal functions tends to develop neurotic reactions in boys whose mental aptitudes are predominately non-verbal. These reactions are heightened by teachers who express their own conscious or unconscious class prejudices by giving pupils to understand that deficiency in verballity will condemn them to a life of manual labor and that manual labor is socially inferior to white collar work. The feeling of inferiority so engendered may lead to rebellion and crime.

³³ BROMBERG, CRIME AND THE MIND (1948) 181.

One of the most strategic points of attack in any campaign to reduce juvenile delinquency is the education of parents. They must be taught a sensible attitude toward children's petty stealing, sexual explorations and rebellions against authority. More malignant criminals are created in childhood by overly harsh than by overly indulgent parental attitudes. Burning the fingers that pilfer from mother's pocketbook may well act as a brand marking a lifetime rebel against law and order.

Crime almost never comes as a bolt out of the blue. This is true of youthful car larcenists and of bank presidents who have run afoul of the law. A careful scrutiny of their past behavior will show that they had been skating on pretty thin ice for some time. The same can be said of the homes from which delinquents have come. It is extremely rare to find a delinquent child coming from a non-delinquent home in which there had existed a really healthful relationship of the parents with each other and with their children. Anything that will promote such relations will materially reduce the incidence of delinquency and also of neurotic behavior.

The most hopeful sign for the future is the fact that everywhere—among psychiatrists, jurists, penologists and among informed laymen—there has come a recognition that our past methods of dealing with delinquency and crime have been highly unsuccessful. This ferment and discontent with present methods is necessary in order to make future progress with a problem as firmly rooted in social prejudice as the problem of crime. The American Law Institute has suggested the massive undertaking of writing a model criminal code, with the help of experts from other disciplines. The California legislature has appropriated large sums of money to study sex offenders scientifically. Maryland is embarking on a new method of recognizing and dealing with psychopathic criminals. The time is now ready for some of our great universities to embark on a multidisciplinary study of crime—which along with war, disease and poverty is one of today's four horsemen of the Apocalypse.